19 Kansas, 458 (27 Am. Rep. 149), contains an elaborate review of the authorities, and reaches the same conclusion.

It seems to be well settled that in an action on a judgment of a sister State, the defendant, notwithstanding the record shows a return by the sheriff of personal service, may contradict the return and show that no service was in fact ever made upon him, and that the judgment is therefore void. *Knowles* v. *Gas Light Co.*, 19 Wall. 58, and cases cited. On principle, there would seem to be no difference between the right to controvert the record when it comes from another State and a domestic record. By the Federal Constitution the judgment of the sister State is entitled to "full faith and credit"—no more and no less than domestic judgments.

Inasmuch as the defendant in the principal case failed to bring herself within the rules which would entitle her to relief, even if the right to controvert the return of the sheriff were conceded—as shown in the opinion of the court—she having failed to show that she had no actual notice of the proceeding or that she had a meritorious defense—the ruling of the court upon the conclusiveness of the return can scarcely be regarded as necessary to the decision, or as finally settling the question in Virginia

In *Fowler* v. *Mosher*, 85 Va. 421, a defendant in a chancery case was allowed, in the same proceeding, to controvert the return of the sheriff. The return recited service upon a member of the defendant's family. He was allowed to prove that in fact the person was not a member of his family.

MUMPOWER V. CITY OF BRISTOL.*

Supreme Court of Appeals: At Wytheville.

July 1, 1897.

1. STATUTE OF LIMITATIONS—*What causes survive—Damages resulting from suing out an injunction.* An action against a defendant for maliciously and without probable cause suing out an injunction against a plaintiff whereby the operation of his mill was suspended, is barred after one year from the dissolution of the injunction. In case of death the cause of action would not survive. The damages allowed to be recovered by or against a personal representative by sec. 2655 of the Code are direct damages to property and not those which are merely consequent upon a wrongful act to the person only.

Error to a judgment of the Circuit Court of the county of Washington, rendered October 9, 1896, in an action of trespass on the case, wherein the plaintiff in error was the plaintiff, and the defendant in error was the defendant. *Affirmed.*

The opinion states the case.

---

*Reported by M. P. Burks, State Reporter.

Fulkerson, Page & Hurt, A. H. Blanchard, and *D. F. Bailey,* for the plaintiff in error.

J. S. Ashworth, and *Taylor, Winston & Read,* for the defendant in error.

KEITH, P., delivered the opinion of the court.

William H. Mumpower brought an action on the case in the Circuit Court of Washington county against the City of Bristol, and afterwards filed a declaration, in which, among other things, he avers that he is the owner of a certain tract of land situated in the county of Washington, upon which there is a mill operated as a grist or custom mill, the machinery, appliances and contrivances of which are propelled by water of —— creek, first collected and detained in a dam situated upon said tract of land, which dam was, and still is, the property of the plaintiff. In October, 1891, the defendant, the City of Bristol, filed a bill in chancery in the Circuit Court of Washington county praying for and obtaining an injunction against the plaintiff restraining him from the free and rightful use of the waters of said creek for the purpose of propelling and running his mill. This injunction remained operative until the 13th day of July, 1893, and by a decree of the Court of Appeals of Virginia the bill of the City of Bristol was dismissed, and the injunction vacated and annulled, but by this decree no damages were allowed or awarded him against the City of Bristol, or any provision made for their recovery.

The plaintiff then avers that by reason of the malicious obtaining and suing out of the said injunction, without probable cause, he was greatly injured in his business and employment of running and operating his mill, and was deprived of great profits and gains by reason thereof, and that the losses and charges in and about the chancery cause aforesaid amount together to the sum of $1,300.

The defendant pleaded not guilty, and for a further plea the defendant by its counsel says, "that the said several causes of action in the said declaration mentioned, did not, nor did any, or either of them, accrue to the plaintiff within one year next before the commencement of this suit in manner and form as the plaintiff hath above thereof complained against it."

The plaintiff objected to this plea, but the court overruled his objection and permitted the plea to be filed; whereupon issue was joined upon both pleas.

Upon the trial of the case before a jury the court, at the instance of the defendant, instructed the jury as follows:

"The court instructs the jury that if they believe from the evidence that the period of one year had elapsed since the dissolution of the injunction before this suit was instituted, then the plaintiff's demand is barred by the statute of limitations and they must find for the defendant."

To the giving of this instruction the plaintiff objected, but the court overruled his objection, and thereupon the plaintiff by counsel excepted.

The jury found a verdict for the defendant, and the plaintiff moved the court to set it aside, which the court refused to do and entered judgment for the defendant; thereupon the plaintiff again excepted, and subsequently applied to this court for a writ of error, which was awarded.

The only question to be considered is presented by the plea of the statute of limitations.

Sec. 2927 of the Code provides a limitation of five years in every personal action for which no limitation is otherwise prescribed. "If it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued."

The plaintiff in error contends that the action in this case belongs to that class which in case of the death of a defendant could be brought against his personal representative, and for this position relies upon sec. 2655 of the Code, which is as follows:

"An action of trespass, or trespass on the case, may be maintained by a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent."

The wrongful act which the defendant is alleged to have committed and for the injury resulting from which the plaintiff sues, consisted in maliciously and without probable cause suing out an injunction against the plaintiff whereby the operation of his mill was suspended. It is quite obvious that this injunction did not operate to take or carry away the goods of the plaintiff, nor cause the waste or destruction of, or inflict any damage upon, the estate of the plaintiff. It is true that the language of the statute is comprehensive and embraces damage of any kind or degree to the estate, real or personal, of the person aggrieved;

but the damage must be direct, and not the consequential injury or loss to the estate which flows from a wrongful act directly affecting the person only. No part of the defendant's property was taken or carried away; no part of it was wasted or destroyed; the plaintiff's use of his property and not the property itself was affected by the act of which he complains.

We are of opinion that such a right of action does not survive, and that it was barred by the limitation of one year.

There is no error in the judgment complained of, and it is affirmed.

Affirmed.

NOTE.—In *Grubb* v. *Sult*, 32 Gratt. 203, it was held that the right of action for breach of promise of marriage did not survive against the promisor's estate, since the wrong was in the nature of a personal injury. It was suggested, however, that the rule might possibly be otherwise in case of special damage to the estate of the plaintiff. And though the court expressly declined to pass upon the question, leave was given to the plaintiff to amend her declaration, by alleging special damage to her estate, if she should be so advised. It does not appear what the final result of the litigation was. The principal case settles this question in the negative, viz., that the claim for indirect and incidental damages to the estate, arising from an injury purely personal in its nature, does not survive against the defendant's estate. A similar ruling was made in *Payne's Appeal*, 65 Conn. 397 (48 Am. St. Rep. 215). In that case the plaintiff had married a woman, with whom he cohabited for several years as his lawful wife, until her death. After her decease, having ascertained that at the time of the marriage she already had a living husband and had practised a fraud upon him, the plaintiff brought an action against her personal representative to recover the value of the support and maintenance with which he had provided her during their cohabitation. The court held that in substance the wrong was a personal injury, and the damage to property a mere aggravation, and that the action did not survive. "The wrong was complete, the legal injury was inflicted, the moment this invalid marriage was consummated. The injury may continue, and subsequent events may aggravate the resulting damages, but they cannot change the nature of the wrong or alter the legal injury which is the cause of action. The legal injury is not to property, but to the person."

In *Cregin* v. *Brooklyn etc. R. Co.*, 75 N. Y. 192 (31 Am. Rep. 459), it was held that an action by a husband for personal injuries to his wife, *per quod servitium amisit*, and to recover for the expense of her cure, might be revived, as the action was grounded in tort to the estate. The distinction made in the principal case between direct injuries to the estate and consequential injuries resulting indirectly from personal injuries, is pointed out by Rappallo, J., in the following language: "Where an injury is done to the person of the plaintiff, the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single, and consists in injury to the person; the damages are the consequence merely of that injury, and where, by the terms of the statute, such a cause of action abates, the character of the damages cannot save it."

On the same principle, where one sues for personal injuries to his child or servant, the action is in substance based upon a wrong to property rights rather than those merely personal, and may be revived.

In *Wade* v. *Kalbfleisch*, 58 N. Y. 282 (17 Am. Rep. 250), an action for breach of promise of marriage was held not revivable, even as to damages to the estate, since, as the court said, the action is indivisible, and, if revived at all, must be revived in its entirety. See, also, *Jenkins* v. *French*, 58 N. H. 532; *Wolf* v. *Wolf*, 40 Ohio St. 111; *Chase* v. *Fish*, 132 Mass. 359.

If the principle were once established that actions for personal injuries are revivable, so far as to permit recovery for all such damages as result to property interests, the practical result would be to make every such action revivable, since cases where the elements of such incidental damages are not present are extremely rare. Where a trader or professional man is slandered, a large part of the expected recovery consists of damage to his business and estate; in assault and battery, and other claims growing out of personal torts, damages to the plaintiff's estate, in the way of loss of time, doctors' bills, etc., constitute important elements of the recovery. Yet such damages, being incidental only, and the claim being, in substance, one for personal injuries, it is uniformly held that such actions are not revivable.

Though not expressly so stated in the opinion, the principal case necessarily decides that the malicious prosecution of a civil suit is substantially a tort to the person or reputation, and not to the estate. This would seem certainly to be true where the prosecution is criminal. The humiliation of arrest of the person, and the injury to the reputation by being publicly accused of a crime, make the wrong peculiarly one to the person. Such actions, it is believed, are universally classed amongst those for defamation of character. See monographic note to *Ross* v. *Hixon* (Kansas), in 26 Am. St. Rep. 123, 127, 164. So the malicious prosecution of civil proceedings which affect the reputation of the defendant—as where his person is arrested, his goods attached, or he is falsely accused of wrong-doing—would seem to be properly classified as personal injuries. It is not so clear, however, where one claims the right to the exclusive use of the water of a certain stream, and enjoins another from using it, as in the principal case, that the prosecution of such injunction, even though malicious, touches the person or the reputation of the defendant—or that in a subsequent action based on such malicious prosecution, in which the sole damage claimed is the injury to the plaintiff's business by reason of inability to use the water in the operation of his mill, such an action is grounded on injuries to the person and not to property. If the allegation had been that the city of Bristol had torn down the mill-dam, or diverted the water from his mill-race, or otherwise interfered with the operation of the plaintiff's mill, *in pais*, without any judicial proceeding, clearly the action would have been for injury to property, and within the revivable class. Where the allegation is that similar wrongs were done by a wrongful and malicious abuse of the process of the court, it is not perceived that the injury is thereby converted into a wrong to the person. But we know of no authority for the distinction suggested.